(1)

Supreme Court, U.S.
FILED

DOCKET NO. 01-79 JUL 05 2001

OFFICE OF THE CLERK

IN THE

UNITED STATES SUPREME COURT

WILL J. CARTER Petitioner (Appellant/Plaintiff Below) vs. SUN LIFE OF CANADA, SUN LIFE ASSURANCE COMPANY OF CANADA, ARTHUR M. PEPELEA, JR., WILLIAM M. SHEARER, HAROLD E. BISHOP, JOHN N. PAUGH, BARBARA JOY, and ASTRO ENTERPRISES, INC. Respondents (Appellees/Defendants Below	) On Petition) For Writ of) Certiorari to) The Indiana) Supreme Court

PETITION FOR WRIT OF CERTIORARI

Sharon L. Wright
Attorney at Law
6601 West 700 North
Frankton, IN 46044
Tel: (765) 754-7856
Attorney for Petitioner
WILL J. CARTER

17pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Constitution prohibits a corporation to retain a key-man life insurance policy as its personal property, over the objection of an insured whose relationship to the corporation has terminated, and who owes no debt to the corporation; such speculation in human life being a pernicious form of slavery, invasion of privacy, deprivation of life, liberty and the pursuit of happiness, and violation of inalienable human rights.

2. Whether dismissal of a lawsuit for plaintiff's failure to take action for sixty (60) days violates substantive due process where plaintiff seeks equitable relief against a $1 Million assignable contract payable on his death to a corporation which suffers a detriment to the extent plaintiff lives, but will benefit substantially upon his death.

3. Whether dismissal of a lawsuit for plaintiff's failure to take action for sixty (60) days violates substantive due process where plaintiff was given no notice by his own attorney, nor defense counsel who filed a motion to remove plaintiff's attorney, nor the court, that a motion had been filed and granted allowing plaintiff's counsel to withdraw.

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Basis for Jurisdiction	3
Constitutional Provisions and Trial Rule	3
Statement of the Case	3
Argument	4
Appendix	9

TABLE OF AUTHORITIES

U.S. Constitution, Fifth Amendment	4,7
U.S. Constitution, Thirteenth Amendment	4,7-8
U.S. Constitution, Fourteenth Amendment	4,7
Benton v. Moore, 622 N.E.2d 1002 (Ind.App. 1993)	6
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.865 (1950)	5
Warnock v. Davis, 104 U.S. 775, 780, 26 L.Ed. 924 (1881)	7
28 U.S.C. § 1257	3
Indiana Rules of Trial Procedure, Rule 5(A) and 5(B)	6
Indiana Rules of Trial Procedure, Rule 41(E)	4,6-7
Indiana Rules of Trial Procedure, Rule 72(D)	6

BASIS FOR JURISDICTION

Carter seeks review of an order of the Indiana Supreme Court dated April 6, 2001, denying transfer from a Memorandum Decision-Not For Publication of the Indiana Court of Appeals, dated September 20, 2000, affirming administrative dismissal of the action.

28 U.S.C. § 1257 confers jurisdiction on this Court to review a final decree by the highest State court by writ of certiorari.

STATEMENT OF THE CASE

Carter's Complaint claims that defendants are carrying a life insurance policy as a wager on his life, a **"better bet than the Indiana lottery,"** displaying "unconscionable and total disregard for the rights and life of this black American," so as to shock the conscience. The court dismissed Carter's action on a judicial administrative rule, no action for 60 days.

Invasion of privacy was raised at the June 7, 2000 hearing:

> JUDGE: But I never understood what the harm is. What...How is Mr. Carter harmed by...by Jack Schearer or Mr. Paugh or ...
> MRS. WRIGHT: That's not...
> JUDGE: whatever having an insurance pol...a policy of insurance on his life that they're paying the premiums?
> MRS. WRIGHT: Judge...
> JUDGE: Now if they went and murdered him to get

> the money, that's something else. I understand that point.
> MRS. WRIGHT: And it would be a good plot too, wouldn't it? Now...
> JUDGE: Well, I don't...I'm not asking you that. What's the harm to Mr. Carter?
> MRS. WRIGHT: The harm is the threat and invasion of privacy that Mr. Carter feels for having some persons out here intending to profit by his death. That's the harm.

The evil of a wagering contract on the life of another was raised in the opening Brief of Appellant, and in Appellant's Petition and Brief in Support of Petition to Transfer, which also raised the Thirteenth Amendment prohibition against slavery. The issue was ignored.

Lack of substantive due process under the Fifth and Fourteenth Amendments was raised in the opening Brief of Appellant, and Appellant's Petition and Brief in Support of Petition to Transfer; and in Reply Brief of Appellant Will J. Carter, citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.865, 874 (1950), at page 10. The issue was ignored.

ARGUMENT

Carter brought this action to enjoin Sun Life of Canada and Astro Enterprises, Inc. from maintaining and profiting by a $1,000,000 life insurance contract on Carter's life, which Astro

claims to own as its personal property, including a right to change beneficiaries and to assign ownership to whomsoever it chooses.

When the policy was sold, Carter was a 51% shareholder in Carter Express, Inc., which leased trucks from Astro to haul freight under a minority trucking contract with General Motors (Carter is Black). After Carter sold his 51% to the Astro defendants, he demanded the $1 Million policy be canceled. Astro refused, predicting Carter's early death from stress, suicide, or murder, and stated the insurance policy is "a better bet than the Indiana lottery."

Carter's action was set for trial on 03/31/98, but reset to 06/16/98, then to 12/15/98, on defendants' motions to continue. Indiana Rules of Trial Procedure, Rule 41(E), allow the trial court to dismiss a civil case when the plaintiff has taken no action for sixty (60) days; but dismissal for inaction while the case is on the trial calendar is not permitted, Benton v. Moore, 622 N.E.2d 1002 (Ind.App. 1993). At final pretrial, Carter's lawyer stated he wanted to withdraw, whereupon the 12/15/98 setting was subsequently vacated on *defendants'* motion to continue, thereby allowing for dismissal under Trial Rule 41(E) any time after February 13, 1999, if no action were taken by plaintiff.

In late December 1998, Carter's lawyer served a motion to withdraw on defendants, but not on Carter, nor was it filed. On March 4, 1999 [after the 60 days has lapsed], *defense counsel* filed the motion to withdraw received from plaintiff's lawyer in late December 1998, but did not give Carter notice, contrary to Indiana Trial Rule 5(A) and (B) Although the motion and record showed no notice to Carter, the trial court signed an order allowing Carter's counsel to withdraw, but notice of the order was not served on Carter, who was now again pro se, contrary to Indiana Trial Rule 72(D).

Carter's first notice of motion and order leaving him without an attorney was when he received defendants' motion to dismiss for inaction, filed March 29, 1999. Coupled with forgery of Carter's name by a prior lawyer on a release given to Sun Life of Canada [which misconduct was before the trial court], Carter's chances of finding replacement counsel were slim. Nevertheless, at the hearing on June 7, 2000, Attorney Wright entered an appearance and requested a trial date. Even so, the case was administratively dismissed.

Were Carter's action merely for monetary relief, dismissal would nevertheless be grossly unfair and unjust. But here, the action is brought in equity to protect a fundamental human right to be free

of contracts between those who would gamble to profit from one's death, U.S. Constitution, Fifth, Thirteenth and Fourteenth Amendments; Warnock v. Davis, 104 U.S. 775, 780, 26 L.Ed.924, 927 (1881) (if party taking the policy has no benefit from continued life of the insured, but directly benefits in his early death, such policy is condemned as speculation in human life; creditor's interest in policy is limited to amount of debt owed); and basic human dignity.

Dismissal under a judicial administrative rule for inaction while Carter's attorney was removed by the court unbeknownst to him, through attorney misconduct, so shocks the conscience that it becomes a substantive due process violation of Carter's rights as an American citizen, and implicates the Thirteenth Amendment prohibiting all forms of slavery, including treating another human being's death as personal property to be pledged at the bank, or the contract sold to the highest bidder.

The Indiana judiciary has flatly refused to address Carter's plea for cancellation or injunction against the Astro/Sun Life wagering contract on his life. The trial judge said Carter had no legal complaint, unless he was murdered. The Indiana Court of Appeals mentioned Carter's claim in a footnote, erroneously suggesting the

issue was not adjudicated under the rule that an involuntary dismissal is on the merits for purposes of res judicata.

By implementing and upholding a judicial administrative rule designed to deny a plaintiff legal redress through established state procedures, the Indiana judiciary has reduced Carter to the status of a chattel whose very certain death can be pledged at the bank or the contract sold. Carter must now live in lonely shadows, wary of the hunters with guns and poison, ever vigilant against unknown assailants hired by unknown assignees, consumed with greed to collect the tax free $1 Million payable on his death.

Carter therefore respectfully prays that the United States Supreme Court issue its writ of certiorari to the Indiana Supreme Court ordering that the $1 Million life insurance policy sold by Sun Life of Canada to Astro Enterprises, Inc. became void and prohibited when Carter's relationship to the business enterprise terminated without any debt owed by him to Astro Enterprises, Inc., which claims to own the policy and its anticipated proceeds.

Respectfully submitted,

Sharon L. Wright
Attorney for Petitioner WILL J. CARTER

APPENDIX

Opinions and orders in conjunction with the judgment

The Indiana Supreme Court's order on denial of transfer:

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES [SIC] VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

The Memorandum Decision - Not For Publication of the Indiana Court of Appeals:

Appellant-plaintiff Will J. Carte appeals the dismissal of his cause of action in accordance with Ind. Trial Rule 41(E) that was granted in favor of the appellees-defendants Astro Enterprises, Inc., et al. (Astro), for failing to prosecute his claims against Astro regarding a life insurance contract and various business dealings he had with that company. Specifically, Carter maintains that his cause of action for breach of contract, fraud, negligence, racketeering and infliction of emotional distress against Astro should not have been dismissed because those claims were meritorious and he exhibited diligence in prosecuting his claims.

FACTS

In 1982 Carter formed Carter Express, Inc. (Carter Express), a corporation which engaged in freight hauling. Nearly two years later, Carter entered into an agreement with John Paugh, the majority shareholder in Astro, whereby Carter agreed to sell Paugh a 49% interest in Carter Express in exchange for the corporation's agreement to lease its trucks from Astro. In 1988. Carter and Paugh entered into a buy/sell agreement which provided, inter alia, that Paugh would be the general manager of the corporation. Astro approached Carter in July 1999 regarding the purchase of a $1 million life insurance policy. A policy was eventually issued by Sun Life, purportedly to Astro as owner, payable 80% to Astro and 20% initially to Carter Express, which was subsequently changed to Paugh on December 5, 1991. Carter contended that he signed the insurance application in blank and that he never intended for Astro to be the owner and major beneficiary under the policy. Moreover, Carter alleged that the statements contained in the application representing that he was a shareholder/officer of Astro were false. As a result, Carter maintained that the Sun Life policy was improperly issued because an assignment or issuance of a life insurance policy to a person having no insurable interest in the insured's life is prohibited under the laws of this State. [n 1. IND. CODE § 27-8-3-8.] After a series of disagreements, Carter ultimately demanded that Astro cancel the $1 million insurance policy which it refused to do.

On January 29, 1996, Carte filed an amended complaint against Sun Life, Astro and others, [n 2. Carter filed his first pro se complaint against the defendants on November 22, 1995.] alleging that the defendants had attempted to wrongfully appropriate the assets and business of Carter. Specifically, Carter maintained that the defendants had breached their fiduciary duties toward him and had interfered with contractual relations. Carter sought to rescind the contract and requested damages for breach of contract and fraud. Record at 21-37. Carter also sought damages for intentional infliction of emotional distress with the intent to cause serious injury possible resulting in death in light of the $1 million in life insurance policy.

The matter was eventually scheduled for trial on March 31, 1998. Astro and other defendants filed a number of motions to continue the trial, including one on December 15, 1999. That motion

included a statement that Carter's counsel "has indicated his intention to withdraw from his representation." R at 119. As a result of the December 15 motion, the trial court did not reset the case for trial.

Carter's counsel, Craig Karpe, served a motion to withdraw upon the defendants on December 21, 1998. Karpe had warned Carter sometime during that month that "he should be looking for a new attorney [because he] would withdraw sometime at the first part of the next year." R. at 181. Karpe also asserted in the motion that he was intending to withdraw because Carter had failed "to supply necessary evidence and documents and otherwise effectively assist Counsel in the preparation th[e] case." R. at 122. Although Astro received a copy of the motion, Karpe apparently did not file it until March 4, 1999, at which time it was approved by the court.

On March 29, 1999, the Astro Defendants filed a motion to dismiss Carter's cause of action in accordance with T.R. 41(E) for failure to prosecute his claim. The trial court then set a hearing date of June 7 regarding that motion. On that day, Carter's replacement counsel entered an appearance in the cause. She requested a trial date and opposed Astro's motion to dismiss. Following the hearing, the trial court granted Astro's motion to dismiss. Carter now appeals.

DISCUSSION AND DECISION

I. Standard of Review

A trial court's authority to dismiss for failure to prosecute arises from its administrative discretion in the conduct of its business. Gibbs v. Douglas M. Grimes, P.C., 489 N.E.2d 638, 641 (Ind. Ct. App. 1986). Such authority is further grounded in the relevant provisions of T.R. 41(E) which are as follows:

> Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at

> plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

We will reverse the trial court's decision to dismiss under this rule only in the event of an abuse of discretion. Benton v. Moore, 622 N.E.2d 1002, 1004 (Ind. Ct. App. 1993). An abuse of discretion occurs only if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id. At 1005. We will affirm the judgment if there is any evidence supporting the trial court's decision. Id.

II. Carter's Claims

In addressing Carter's claims that the trial court erred in granting Astro's motion to dismiss, we initially observe that this court will balance a number of factors when determining whether the trial court has committed an abuse of discretion in granting a dismissal. Lee v. Friedman, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994). These factors include: the length of the delay; the degree of personal responsibility on the part of the plaintiff; the degree to which the plaintiff will be charged for the acts of his attorney; and the presence or absence of a lengthy history of having deliberately proceeding in a dilatory fashion. Id. The weight any particular factor has in a particular case appears to depend upon the facts of the case. Id. Additionally, a lengthy period of inactivity may be enough to justify dismissal in the circumstances of a particular case. Id.

In the instant case, the record reflects that Carter took no action to prosecute his case for more than sixty days prior to the filing of the motion to dismiss on March 29, 1999. As early as December 1998, Karpe advised Carter to retain substitute counsel because he was withdrawing from the case. R. at 199. Between the December 15, 1998 filing of the motion for continuance and the March 29, 1999 filing of the motion to dismiss, Carter took no action with respect to the advancement of his case. It was not until the June 7, 1999 hearing date on the motion to dismiss that Carter's substitute counsel entered an appearance. As a result, Carter delayed in taking any action for nearly six months.

We also note that Carter's failure to cooperate with Karpe and assist him in the preparation of the case facilitated the delay. R. at 122. Moreover, the record reflects that Carter displayed a history of dilatory conduct in prosecuting the action, inasmuch as he failed to respond to various discovery requests until the trial court issued an order to compel. R. at 9. The trial court also observed during the hearing on the motion to dismiss that it was Carter, and not counsel, who was "dragging his feet" with respect to the case. R. At 202. While Carter admitted that he was aware of his counsel's intention to withdraw from the case, he took no action to obtain alternate counsel and request a trial date. Even though Carter urges on appeal that he needed substantial time in which to procure replacement counsel, such a contention remains unsubstantiated, inasmuch as Carter has made no showing that he made any earlier efforts or attempts to obtain substitute counsel. Finally, it is apparent that Carter was driven to action only by the dismissal because he took no action in the case until the date of the hearing on that motion. As a result, we cannot say that the trial court's decision was against the logic and effect of the facts and circumstances before it. Thus, we decline to reverse the dismissal of Carter's cause of action as an abuse of discretion.

[n. 3 Inasmuch as we have concluded that the trial court properly dismissed the action pursuant to the provision of T.R. 41(E), we need not address Carter's contention that it was error to dismiss the cause of action in light of the improper determine that "Carter did not have a meritorious claim for rescission and cancellation of the $1 Million Sun Life insurance policy." Appellant's brief at 2. Contrary to Carter's assertion, we note that the trial court did not reach such a conclusion. R. at 213-14]

Judgment affirmed.

Trial court's order and judgment entry:

10/19/99 Motion to dismiss herewith granted. Costs paid
Judgment Fredrick R. Spencer, Judge [RP 011, CCS]

Constitutional provisions and Trial Rules

U.S. Constitution, Fifth Amendment:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *

U.S. Constitution, Thirteenth Amendment:

Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Constitution, Fourteenth Amendment:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the qual protection of the laws.

Indiana Rules of Trial Procedure, Rule 5(A) and (B):

(A) Service: When required. Unless otherwise provided by these rules or an order of the court, each party and special judge, if any, shall be served with:
(1) Every order required by its terms to be served;
(2) Every pleading subsequent to the original complaint;
(3) Every written motion except one which may be heard ex parte;
(4) Every brief submitted to the trial court;
(5) Every paper relating to discovery required to be served upon a party; and
(6) Every written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be

served upon them in the manner provided for service of summons in Rule 4.

(B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.

Indiana Rules of Trial Procedure, Rule 41(E):

(E) Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

Indiana Rules of Trial Procedure, Rule 72(D):

(D) Notice of Orders or Judgments. Immediately upon the entry of a ruling upon a motion, an order or judgment, the clerk shall serve a copy of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and shall make a record of such mailing. Such mailing is sufficient notice for all purposes for which notice of the entry is required by these rules; but any party may, in addition, serve a notice of such entry in the manner provided in Rule 5 for the service of papers. * * *

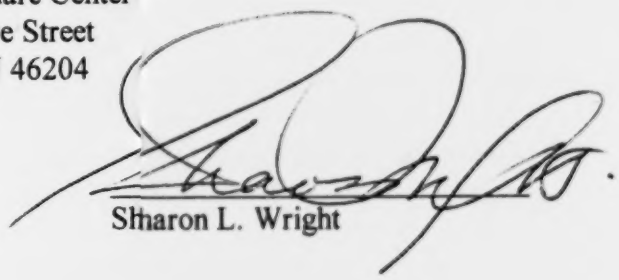
CERTIFICATE OF SERVICE

I affirm under the penalties for perjury that on July 5, 2001, I served three true and exact copies of the within Petition for Writ of Certiorari, via United States Mail, first class, postage fully prepaid, addressed to:

Theodore F. Smith, Jr.
Smith & Todd, P.C.
215 Historical West Eighth Street
Anderson, IN 46016

Richard H. Reigner
Kristine Lindley
Carol A. Nemeth
White & Raub
One North Capitol Avenue, 10th Floor
Indianapolis, IN 46204

Michael E. Brown
David R. Schanker
Kightlinger & Gray
660 Market Square Center
151 N. Delaware Street
Indianapolis, IN 46204



Sharon L. Wright